(5) (5)

Supreme Court, U.S.
FILED
MAR 13 1995
OFFICE OF THE

No. 94-1173, 94-1213

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

PEOPLE OF THE STATE OF CALIFORNIA, ET. AL.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET. AL.

Respondents.

STATE OF NEW YORK, ET. AL.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET. AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, AND FORTY-TWO STATE COMMISSIONS, CONSUMER ADVOCATES, AND ATTORNEYS GENERAL JOINT BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS CALIFORNIA AND NEW YORK

WILLIAM PAUL RODGERS, JR.
GENERAL COUNSEL & *COUNSEL OF RECORD**

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
Post Office Box 684
Washington, D.C. 20044-0684
(202) 898-2200
Counsel for Amici Curiae

Dated: March 13, 1995

* Additional counsel and parties are listed on inside cover and Appendix A.

BEST AVAILABLE COPY

W. PAUL RODGERS, JR.
General Counsel
CHARLES D. GRAY
Assistant General Counsel
JAMES BRADFORD RAMSAY
Deputy Assistant General Counsel
National Association of Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 898-2200

ARTHUR H. STUENKEL
Staff Attorney
Arkansas Public Service Commission
1000 Center Street
P.O. Box 400
Little Rock, AR 72201
(501) 682-2047

DEBRA R. BERLYN
Executive Director
National Association of State Utility Consumer Advocates
1133 15th Street, NW
Suite 575
Washington, D.C. 20005
(202) 727-3908

WINSTON BRYANT
Attorney General
State of Arkansas
200 Tower Building
323 Center Building
Little Rock, AR 72201
(501) 682-2007

CARL L. EVANS
Chief Administrative Law Judge
Alabama Public Service Commission
1 Court Square
P.O. Box 991
Montgomery, Alabama 36101
(334) 242-5200

PAUL A. BULLIS
Chief Counsel
Arizona Public Service Commission
1200 West Washington
Phoenix, Arizona 85007
(602) 542-3402

DON SCHROER
Chairman
Alaska Public Utilities Commission
1016 West 6th Avenue
Suite 300
Anchorage, Alaska 99501
(907) 276-6222

RONALD J. BINZ
Director
Colorado Office of Consumer Counsel
1580 Logan Street
Suite 610
Denver, Colorado 80203
(303) 894-2123*

* **Signature blocks continued on inside back cover of brief.**

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Communications Commission
("FCC" or "Commission")
may lawfully preempt State regulation applicable solely
to the intrastate services of a local telephone company
("LEC" or "Carrier")
whenever the FCC believes that such State regulation would make
it more expensive or difficult to achieve its § 151 - derived
policy of encouraging the LECs to be more efficient?

LIST OF PARTIES

A - Petitioners & Respondents

MCI Telecommunications Corporation - Petitioner

Newspaper Association of America - Petitioner

People of the State of California & Public Utilities Commission of the State of California - Petitioners

Public Service Commission of the State of New York - Petitioner

Federal Communications Commission & the United States of America - Respondents

B - Others

Ad Hoc Telecommunications Users Committee
ADT Security Systems
American Telephone and Telegraph Company
Ameritech Corporation
Association of Telemessaging Services International
Bell Atlantic Telephone Companies
[Bell Atlantic Corporation]
[Bell Atlantic Systems Leasing International, Inc.]
[Bell Atlantic Tricon Leasing Corporation]
[Bell Atlantic Financial Services, Inc.]
[Bell Atlantic Mobile Systems, Inc]
[Bell Atlantic Network Funding Corporation]
[Bell Atlantic Capital Funding Corporation]
BellSouth Corp. & BellSouth Telecommunications, Inc.
California Cable Television Association

List of Parties (Continued)

Compuserve, Inc.
District of Columbia Public Service Commission
Florida Public Service Commission
GTE Service Corporation
H&R Block, Inc.
Information Industry Association
Information Technology Association America
Maryland People's Counsel
Metromedia Paging Services
National Association of Regulatory Utility Commissioners
NYNEX Corporation
[New York & New England Telephone]
Pacific Telesis Group
[Pacific Bell and Nevada Bell]
Pennsylvania Office of Consumer Advocate.
Pennsylvania Public Utility Commission.
Southwestern Bell Telephone Company
[Southwestern Bell Corporation]
[Southwestern Bell International Holdings Corporation]
[Southwestern Bell Publications, Inc.]
[Southwestern Bell Telecommunications, Inc]
[Southwestern Bell Mobile Systems, Inc.]
Sprint Communications Company
Telecom Corporation of New Zealand
United States Telephone Association
U.S. West Communications, Inc.
Voice-Tel Enterprises

TABLE OF CONTENTS

Page

PRELIMINARY MATTERS

QUESTION PRESENTED i
LIST OF PARTIES ii
TABLE OF AUTHORITIES v

BRIEF TEXT

I. INTEREST OF AMICI CURIAE 1

A. NARUC 1
B. NASUCA 2
C. Individual State Commissions, Consumer Advocates & Attorney Generals 2

II. REASONS TO GRANT THE WRIT 6

III. OPINION AND JUDGEMENTS BELOW 7

IV. JURISDICTIONAL STATEMENT 7

V. STATUTORY PROVISIONS AT ISSUE 7

VI. STATEMENT OF THE CASE 7

VII. SUMMARY OF ARGUMENT 8

VIII. ARGUMENT 8

A. *California II* ignores and, if left intact, effectively overrules this Court's teachings in *Louisiana* 9

B. *California II* allows the FCC to ignore § 152(b) and preempt valid State regulatory initiatives 12

IX. CONCLUSION 20

TABLE OF AUTHORITIES

CASE: **PAGE**

Indianapolis Power and Light Co. v. Interstate Commerce Commission, 587 F.2d 1098 (7th Cir. 1982) 2

People of the State of California and the Public Utilities Commission of the State of California v. Federal Communications Commission and the United States of America ("*California II*"), No. 92-70083 (9th Circuit - Oct. 18, 1994) . . . . . *passim*

**Louisiana Public Service Commission v. Federal Communications Commission* ("*Louisiana*"), 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 359 (1986) . . . . . *passim*

Public Service Commission of Maryland v. Federal Communications Commission and the United States of America, 909 F.2d 1510 (D.C.Cir. 1990) 16

United States of America v. Southern Motor Carrier Rate Conference, et al., 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985) 2

Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976) 2

* Case principally relied upon.

TABLE OF AUTHORITIES
(Continued)

ADMINISTRATIVE DECISIONS: **PAGE**

Report and Order, *In the Matter of Computer III Remand Proceedings; Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket 90-623, 6 F.C.C. Rec 7571 (1991) 7

Report and Order and Further Notice of Proposed Rulemaking, ("R&O")[FCC 94-59], *In the Matter of Rules and Policies Regarding Calling Number Identification Service*, CC Docket 91-281, 9 FCC Rcd 1764; 74 Rad. Reg. 2d (P&F) 989 (March 8, 1994) 13, 14

STATUTES AND RULES:

Communications Act of 1934, 47 U.S.C. § 151 et seq. (1985):

47 U.S.C. § 151 . . . . . *passim*
47 U.S.C. § 152(b) . . . . . *passim*
47 U.S.C. §§ 220 10

Other citations:

28 U.S.C. § 1254(1) 7
U.S. Supr.Ct. Rule 37, 28 U.S.C.A. (1994) 6, 8

OTHER:

"Statistics of Communications Common Carriers," Federal Communications Commission, 1992/1993 Edition, ISBN 0-16-043012-7 16

S. Rep. No. 1090, 83rd Cong. 2d Sess., reprinted in 1954 Cong. Code and Admin. News 2133 16

No. 94-1173, 94-1213

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

PEOPLE OF THE STATE OF CALIFORNIA, ET. AL.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET. AL.

Respondents.

STATE OF NEW YORK, ET. AL.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET. AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, AND FORTY-TWO STATE COMMISSIONS, CONSUMER ADVOCATES, AND ATTORNEYS GENERAL JOINT BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS CALIFORNIA AND NEW YORK

I. INTEREST OF *AMICI CURIAE*

A. National Association of Regulatory Utility Commissioners:

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889.

NARUC, which Congress calls "the national organization of the State commissions", 47 U.S.C.A. § 410(c) (1971), presents the collective interest of State commissions charged with regulating conditions of service of the intrastate operations of electric, natural gas and telephone utilities. Both Congress and the Federal courts have long recognized that NARUC is a proper party to represent the collective interest of State regulatory commissions.[1]

NARUC's member commissions, which includes both the New York ("NY PSC") and California ("CPUC") commissions, are obligated under State law to ensure that the rates charged to retail consumers are just and reasonable. NARUC's mission is to serve the public interest by seeking to improve the quality and effectiveness of public utility regulation in America.

NARUC participated in all phases of the proceeding below and is concerned about the substantial threat to State jurisdiction posed by the order on review.

---

[1] *See, for example, United States of America v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985). *See also, Indianapolis Power and Light Co. v. Interstate Commerce Commission*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

B. National Association of State Utility Consumer Advocates:

The National Association of State Utility Consumer Advocates ("NASUCA") joins in this Brief. NASUCA is an association of 42 consumer advocate offices in 38 States and the District of Columbia, whose members are designated by State law to represent the interests of utility consumers before State and Federal regulators and in the courts.

C. Individual State Commissions, Consumer Advocates & Attorney Generals: Numerous individual State entities, noting the potential impact of the Ninth Circuit's opinion, contacted NARUC to individually join in this brief and express their strong support for the NY PSC and CPUC petitions. As described earlier, State Commissions have the responsibility to regulate intrastate telecommunications utility operations to prevent harm to the public interest. Generally, State Consumer Advocates have the responsibility to represent utility ratepayers before their respective State commissions and in the courts. State Attorney Generals have similar duties. The following have joined in this brief:

1 - Alabama Public Service Commission

2 - Alaska Public Utilities Commission

3 - Arkansas Public Service Commission

4 - Arkansas Attorney General
for the State of Arkansas

5 - Arizona Public Service Commission

6 - Colorado Attorney General
for Public Utilities Commission of Colorado

7 - Colorado Office of Consumer Counsel

8 - Attorney General for State of Connecticut & the
Connecticut Department of Public Utility Control

9 - Public Service Commission of the District of Columbia

10 - Florida Office of Public Counsel

11 - Florida Public Service Commission

12 - Hawaii Public Utilities Commission

13 - Idaho Public Utilities Commission

14 - Illinois Commerce Commission

15 - Indiana Utility Regulatory Commission

16 - Iowa Utilities Board

17 - Kansas Corporation Commission

18 - Kentucky Public Service Commission

19 - Maryland People's Counsel

20 - Michigan Attorney General
for the State of Michigan

21 - Michigan Attorney General
for the Michigan Public Service Commission

22 - Minnesota Attorney General
for the Minnesota Public Utilities Commission

23 - Missouri Office of the Public Counsel

24 - Missouri Public Service Commission

25 - Montana Public Service Commission

26 - New Hampshire Public Utilities Commission

27 - Attorney General for the State of New Mexico

28 - North Dakota Attorney General
for the North Dakota Public Service Commission

29 - Ohio Attorney General
for the Public Utilities Commission of Ohio

30 - Oregon Public Utility Commission

31 - Pennsylvania Office of Consumer Advocate

32 - Pennsylvania Public Utility Commission

33 - Attorney General for State of Rhode Island
and Providence Plantations

34 - Rhode Island Public Utilities Commission

35 - Public Service Commission of South Carolina

36 - South Dakota Public Service Commission

37 - Utah Public Service Commission

38 - Vermont Attorney General
for the State of Vermont

39 - Vermont Public Service Board

40 - Virginia State Corporation Commission

41 - West Virginia Public Service Commission

42 - Wyoming Public Service Commission

II. REASONS TO GRANT THE WRIT

The opinion below directly conflicts with this Court's holding in *Louisiana Public Service Commission v. FCC* ("*Louisiana*"), 476 U.S. 355 (1986), and, if upheld, essentially eliminates § 152(b)'s, 47 U.S.C.A. § 152(b), reservation of authority to the States from the Communications Act, thereby leaving valid State communications regulation subject to the preemptive caprice of the FCC.

Under the Ninth Circuit-sanctioned preemption standard, the FCC could preempt State regulation of the intrastate portion of "jurisdictionally mixed" services any time such regulation imposes any added costs or alleged "inefficiencies" on the local telephone company. This Court's opinion in *Louisiana* clearly indicates that, because of § 152(b), the FCC's jurisdictional reach is much more limited.

Because of the extreme and deleterious impact upon the ability of State regulatory commissions to effectively regulate intrastate telecommunications that could well ensue should the Ninth Circuit's decision below stand, *Amici* join in submitting this brief [2] in support of the NY PSC and CPUC petitions for certiorari.

---

[2] Pursuant to Rule 37.2, U.S. Supr.Ct. Rule 37, 28 U.S.C.A. (1994), *Amici* have obtained the consent of the parties to the filing of this brief and is filing them concomitantly. All other signatories to this brief are "authorized law officer[s]" within the meaning of Rule 37.5.

III. OPINION AND JUDGEMENTS BELOW

The opinion below is reported at *People of the State of California v. Federal Communications Commission*, No. 92-70083 (9th Cir. Oct. 18, 1994) ("*California II*"). The underlying FCC order "In the Matter of Computer III Remand Proceedings; Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards," CC Docket 90-623, Report and Order, is reported at 6 F.C.C. Rec 7571 (1991), Both are reproduced in the Appendix of the CPUC petition at A1-34 and B1-110 respectively.

IV. JURISDICTIONAL STATEMENT

The judgement below was entered on October 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

V. STATUTORY PROVISIONS AT ISSUE

Relevant statutory provisions are reproduced in the Appendix of the CPUC petition at C1-2.

VI. STATEMENT OF THE CASE

Amici adopts the statements of facts presented by the NY PSC and the CPUC. See, NY PSC petition at 6; CPUC petition at 2.

VII. SUMMARY OF ARGUMENT

As a matter of law, *California II* and this Court's ruling in *Louisiana* are identical. In *California II*, as in *Louisiana*, the FCC defended rules prescribed to further § 151 goals by encouraging efficiency and conceded that the carriers could comply with both State and interstate rules. To justify the preemption proposed in *California II*, the FCC relied on an economic impracticability argument identical to that rejected in *Louisiana*. Nonetheless, the Ninth Circuit essentially ignored *Louisiana*, and upheld FCC preemption based solely upon the FCC belief that State regulation confined to intrastate services would "essentially negate" the very same § 151-derived "federal policies" favoring efficiency referenced in *Louisiana*. Under this construct, the FCC's potentially unlimited preemptive reach could extend to areas clearly within the ambit of § 152(b)'s reservation of State authority, e.g., Caller ID rules and telemarketing regulation.

VIII. ARGUMENT

Amici support all arguments presented in the NY PSC and CPUC petitions. Mindful of Rule 37.1's admonishment, U.S. Supr.Ct. Rule 37.1, 28 U.S.C.A., *Amici* seek only to augment those arguments with brief discussions of (a) related arguments relevant to questions posed by the writs and (b) the potential practical impact of the Ninth Circuit opinion.

A. *California II* ignores and, if left intact, effectively overrules this Court's teachings in *Louisiana*.

Section 152(b), 47 U.S.C. § 152(b) (1990), states: "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier..."

On its face, the statute is clear. Preemption of State regulation of intrastate "communications services" confined to the intrastate sphere is not allowed. Indeed, this Court has characterized this section as "...not only impos[ing] jurisdictional limits on the power of [the FCC], but also...provid[ing] its own rule of statutory construction." (Emphasis Added) *Louisiana*, 476 U.S. 355, 373, 376 n. 5, 106 S.Ct. 1890, 90 L.Ed.2d 359, 384, 387 n. 5(1986).

However, this Court's exegesis of § 152(b) in *Louisiana* is essentially overruled by the Ninth Circuit's opinion; as a matter of law, the circumstances underlying *Louisiana* and the decision below are indistinguishable. Nonetheless, the Ninth Circuit reaches a conclusion that is diametrically opposed to the rationale adopted by this Court in *Louisiana*.

In *Louisiana*, the FCC argued that § 220 of the Act, 47 U.S.C. § 220, which deals explicitly with depreciation, "operates automatically to preempt inconsistent State action." Alternatively, the Commission argued, based on § 151, that "federal displacement of State regulation is justifiable under the Act when necessary 'to avoid frustration of validly adopted federal policies'." Id. 476 U.S. at 362, 90 L.Ed.2d at 377. In describing the boundaries of § 152(b) of the Act, the court rejected both arguments, even in the face of evidence that, in so doing, they would be threatening "..the financial ability of the industry to achieve the technological progress and provide the quality of service that the Act was passed to promote." Id. 476 U.S. at 358, 90 L.Ed.2d. at 375. Thus, the opinion makes clear that the FCC can not legitimately preempt State action which frustrates federal policy under § 151 to develop an "efficient, nationwide communications network," just because such action supposedly "jeopardize[s] the continuing viability of the telecommunications industry." Id. 476 U.S. at 368 & 370, 90 L.Ed.2d at 381 & 382.[3]

In *California II*, the FCC adopted an identical posture (1) defending, as in *Louisiana*, regulations prescribed to

---

[3] Interestingly, time has vindicated this Court's interpretation of the Congressional intent embodied in Section 152(b). The dire predictions leveled by the FCC in Louisiana, concerning the deleterious impact on the network of separate State intrastate regulations, have failed to materialize.

further § 151 goals by encouraging efficiency and competitiveness, *Louisiana*, 476 U.S. at 369; 90 L.Ed.2d at 382; *California II*, slip op. at 12756, CPUC App. at A15, (2) conceding, also as in *Louisiana*, that the phone companies could comply with both State and interstate regulation, and finally, (3) relying on an economic impractibility argument identical to that rejected in *Louisiana*, i.e., contending that otherwise valid State regulations affecting the intrastate portion of dual use facilities must be preempted because they would undermine the above-mentioned § 151-derived efficiency goals.[4]

In *Louisiana*, this Court reversed FCC preemption in spite of (1) clear inefficiencies caused by requiring carriers to keep differing inter- and intrastate depreciation regimes and (2) arguments that such inefficiencies would "frustrate federal policies." Rather, this Court found that the FCC failed to demonstrate that the subject intrastate regulations prevented the FCC from promulgating enforceable interstate regulations. Id. 476 U.S. at 369, 376; 90 L.Ed.2d at 382, 386.

---

[4] "Here...the FCC acknowledges that the BOCs could comply with structural separation requirements, but contends that it would not be economically or operationally feasible for them to do so. The BOCs would be forced to comply with the state's more stringent requirements, or choose not to offer certain enhanced services, thereby defeating the FCC's more permissive policy of integration." See, *California II*, slip op. at 12774-5, CPUC App. at A33-34; Cf. *Louisiana*, 476 U.S. at 369, 375; 90 L.Ed.2nd 382, 385.

In stark contrast, in *California II*, the Ninth Circuit essentially overrules *Louisiana*, and upholds FCC preemption based solely upon the FCC belief that State regulation confined to intrastate services would "frustrate" or "essentially negate" the very same § 151-derived "federal policies" favoring efficiency and competition referenced in *Louisiana*.

Under the Ninth Circuit's construct, the FCC can preempt any time separate State regulation of the intrastate aspects of dual use facilities, though possible, causes economic inefficiencies because the carrier may actually have to comply with the dual regulation explicitly contemplated by § 152(b). Thus, the Ninth Circuit has sanctioned what Congress has expressly forbidden - a radical restructuring of the Communications Act into a single federal jurisdictional scheme. Accordingly, we urge the Court to reverse the opinion below.

B. *California II* allows the FCC to ignore § 152(b) and preempt valid State regulatory initiatives.

As the CPUC has aptly stated, the Ninth Circuit's ruling "elevates the FCC to a court of review of State regulation of intrastate service on issues of cost and efficiency." CPUC petition at page 9. Basically, under the Ninth Circuit-sanctioned preemption standard, the FCC could preempt State regulation of the intrastate portion of

"jurisdictionally mixed" or "dual use" services, any time such regulation will impose any added costs or alleged "inefficiencies" on the local telephone company.

Accordingly, as a practical matter, the potential reach of the Ninth Circuit's overbroad rationale are enormous. The pending FCC Caller Identification ("CID") proceeding [5] provides a case in point. As described below, the FCC has established new blocking requirements which, in many instances, are not consistent with State blocking regimes that have been in place for several years.[6]

A customer subscribing to CID services can access a display of either the phone number or last name of the person calling before answering the call. The two methods most often deployed with CID service for protecting caller privacy are per call and per line blocking. Per line blocking bars disclosure of the calling number automatically for all calls emanating from a particular subscriber line. Per call blocking

---

[5] On March 28, 1994, the FCC released its "Report and Order and Further Notice of Proposed Rulemaking" ("R&O"), 9 FCC Rcd 1764; 74 Rad. Reg. 2d (P&F) 989, as adopted *In the Matter of Rules and Policies Regarding Calling Number Identification Service* in CC Docket 91-281.

[6] Although the Virginia State Corporation Commission did not participate in this FCC docket because of its per call intrastate CID regime, it also believes that, as separate interstate and intrastate blocking regimes are possible, States should have the right to select the form of blocking best suited for that State's intrastate services.

bars disclosure of the calling number only when a code is punched in immediately before dialing a particular phone number.

The FCC's R&O adopts rules, effective April 1995, for interstate CID-based services, making them available nationwide by requiring all carriers to pass to connecting carriers, without charge, the calling party number parameter. The rules also require, for the proposed interstate CID services, free per call blocking and prohibit per line blocking.

As in both *Louisiana* and *California II*, in the CID proceeding, there is record evidence indicating that separate inter- and intrastate blocking regimes are possible. Indeed, forty-one States have already authorized some form of per line blocking for intrastate services.

Nonetheless, at least four parties, responding to the invitation implicit in the R&O, have sought reconsideration of the R&O. They claim that any inconsistent blocking regime for intrastate services must also be preempted, and they cite, inter alia, the economic inefficiency of maintaining separate inter- and intrastate blocking regimes and the FCC's authority to preempt to prevent frustration of the federal goal. Those petitions are pending.

If the expansive rationale sanctioned by the Ninth Circuit is closely followed, State per line blocking regimes are exposed to FCC preemption. Specifically, by using the Ninth Circuit's overbroad interpretation of § 152(b) and by alleging that the intrastate CID rules will impose added costs or "inefficiencies" on the carrier, the FCC could easily argue that preemption is appropriate.

Similarly, the Ninth Circuit's construct would sanction preemption of State telemarketing rules that differ from federal rules. Both the FCC and many States have adopted rules governing the terms for placing machine-dialed calls which deliver prerecorded, telemarketing messages to consumers. Approximately forty States regulate these calls, and most require a live operator introduce the call to obtain the informed consent of the called party to hear the recorded message. Like the State CID blocking rules, the purpose of the live operator requirement is to safeguard the privacy interests of consumers. Federal law, however, does not expressly require a live operator for similar interstate machine dialed calls. Accordingly, under the preemption standard articulated in *California II*, the FCC could contend that preemption of the live operator requirement is appropriate on the basis that it is inefficient or too costly for a telemarketer to comply with differing interstate and intrastate regimes.

Did Congress really mean to give the FCC such expansive authority when it sanctioned a dual inter- and intrastate regulatory regime?

The history of Section 152(b)[7], this Court's opinion in *Louisiana*, and common sense suggest that it did not. It is clear that Congress intended that telephone companies "which are engaged primarily in intrastate activities...should be subject to State and local regulation, rather than federal regulation."[8]

Again, CID service provides a useful example. Whenever interstate CID services ultimately are provided, 86% of the calls will still be intrastate.[9] In addition, consumers in over 43 jurisdictions will have been subject to their intrastate blocking regimes and other conditions of intrastate CID service for an average of 3.3 years by the FCC's April 1995 interstate CID implementation date.

---

[7] Cf., NY PSC's discussion of Section 152(b)'s history in its petition at 8.

[8] S. Rep. No. 1090, 83rd Cong. 2d Sess., reprinted in 1954 Cong. Code and Admin. News 2133 (Emphasis added); Maryland v. FCC, 909 F.2d at 1515.

[9] Even with the increase in interstate call volume over the past 10 years, the overwhelming majority of calls, approximately 86%, continues to be intrastate. Cf. *Statistics of Communications Common Carriers*, 1992/1993 Edition, Federal Communications Commission at page 307, which shows that local and intrastate toll dial equipment minutes have remained above 84% for each of the 11 years referenced since 1980.

Moreover, allowing preemption under the *California II* rationale, under these circumstances would usurp the States' parens patriae role in protecting the privacy interests of its citizens and establishing emergency communications.[10]

Amici respectfully suggest that, under the dual regulatory scheme, Congress surely did not intend such carefully constructed State regulatory paradigms to be subject to the preemptive caprice of the FCC. Nor does it appear appropriate that a local ratepayer, local enhanced service competitor, or consumer harmed by a local exchange carrier's conduct involving a service like CID, which will be used - if historical trends continue - over 85% of the time for intrastate services, should be required to come all the way to the FCC's offices in Washington to seek relief.

---

[10] Prior to authorizing CID service, most states conducted extensive customer outreach and education programs to determine how best to balance the privacy interests of the calling and called parties. Decisions were often debated at some length in the local press and other forums. Many witnesses, including psychiatrists, social workers, police, other public safety officials, as well as family violence crisis centers, saw danger and/or nuisance, and a significant loss of privacy in allowing CID service to be offered without the option of per line blocking. In short, these CID proceedings were a microcosm of popular grass roots democracy in action.

Rather, it seems clear in such cases, Congress intended that such affected entities have the option of seeking relief from the more appropriately positioned State commission - the local agency steeped with in-depth knowledge of local market conditions and the local exchange carrier's other intrastate operations.

The important issue highlighted by the CID litigation is the rationale the FCC presented, and the Ninth Circuit sanctioned, to justify preemption.

If the *California II* rationale is followed in subsequent cases, any State regulation of intrastate portions of a service that does not exactly mirror the FCC's regulation of the complementary interstate service will be subject to (1) FCC charges of "economic inefficiency", and (2) FCC charges that the State regulation "thwarts" the FCC's general Section 151-derived policies. Thus, if other panels follow the Ninth Circuit's reasoning, it is difficult to imagine a circumstance where the FCC cannot, at will, contend that preemption of otherwise valid State regulation of the intrastate aspects of a "mixed jurisdictional service" is appropriate.

Moreover, as the FCC opinion approved in *California II* strongly suggests that there are no remaining services that can be construed as purely intrastate,[11] it is difficult to see how Section 152(b) imposes any "..jurisdictional limits on the power of [the FCC]..." at all. Cf. *Louisiana*, 476 U.S. 355, 373, 376 n. 5, 106 S.Ct. 1890, 90 L.Ed.2d 359, 384, 387 n. 5 (1986). Accordingly, *Amici* respectfully request that this Court grant certiorari and reverse the subject portions of opinion below.

---

[11] Essentially, the FCC has expanded the concept of "end-to-end" communication, a concept developed in a prior era when only toll-type services were at issue and mechanisms for identifying the jurisdictional nature of calls and services were not at issue. Basically, under the FCC construct, any service that can be accessed via a long distance call is "jurisdictionally mixed".

IX. CONCLUSION

For the foregoing reasons, the NY PSC and CPUC petitions for certiorari should be granted.

Respectfully submitted,

WILLIAM PAUL RODGERS, JR.*
General Counsel & COUNSEL OF RECORD
CHARLES D. GRAY
Assistant General Counsel
JAMES BRADFORD RAMSAY
Deputy Assistant General Counsel
National Association of Regulatory
Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 898-2200

DEBRA R. BERLYN
Executive Director
National Association of State
Utility Consumer Advocates
1133 15th Street, NW
Suite 575
Washington, D.C. 20005
(202) 727-3908

DON SCHROER
Chairman
Alaska Public Utilities
Commission
1016 West 6th Avenue
Suite 300
Anchorage, Alaska 99501
(907) 276-6222

CARL L. EVANS
Chief Administrative Law Judge
Alabama Public Service
Commission
1 Court Square
P.O. Box 991
Montgomery, Alabama 36101
(334) 242-5200

ARTHUR H. STUENKEL
Staff Attorney
Arkansas Public Service
Commission
1000 Center Street
P.O. Box 400
Little Rock, AR 72201
(501) 682-2047

WINSTON BRYANT
Attorney General
State of Arkansas
200 Tower Building
323 Center Building
Little Rock, AR 72201
(501) 682-2007

PAUL A. BULLIS
Chief Counsel
Arizona Public Service Commission
1200 West Washington
Phoenix, Arizona 85007
(602) 542-3402

RONALD J. BINZ
Director
Colorado Office of Consumer Counsel
1580 Logan Street
Suite 610
Denver, Colorado 80203
(303) 894-2123

GALE A. NORTON
Attorney General
STEPHEN K. ERKENBRACK
Chief Deputy Attorney General
MERRILL SHIELDS
Deputy Attorney General
RICHARD DJOKIC
First Assistant Attorney General
ANTHONY MARQUEZ
CAROL SMITH RISING
Assistant Attorneys General
Attorneys for Public Utilities Commission of the State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
(303) 866-5395

RICHARD BLUMENTHAL
Attorney General of Connecticut
ROBERT S. GOLDEN, JR.
Assistant Attorney General
Attorneys for State of Connecticut and the Connecticut Department of Public Utility Control
One Central Park Plaza
New Britain, CT 06051
(203) 827-2620

DARYL L. AVERY
General Counsel
JOSEPHINE S. SIMMONS
Staff Counsel
Public Service Commission of the District of Columbia
450 Fifth Street, N.W.
Suite 815
Washington, D.C. 20001
(202) 626-5140

JACK SHREVE
Public Counsel
CHARLES J. BECK
Deputy Public Counsel
Office of Public Counsel
Attorneys for the Citizens of the State of Florida
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399
(904) 488-9330

ROBERT D. VANDIVER
General Counsel
CYNTHIA B. MILLER
Associate General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850
(904) 488-7463

YUKIO NAITO
Chairman
Public Utilities Commission
State of Hawaii
465 South King Street
Kekuanaoa Building, Rm 103
Honolulu, Hawaii 96813
(808) 586-2020

MARSHA H. SMITH
President
DONALD L. HOWELL, III
Deputy Attorney General
Idaho Public Utilities Commission
P.O. Box 83720
Boise, Idaho 83720-0074
(208) 334-0300

MYRA L. KAREGIANES
General Counsel
JOHN P. KELLIHER
Special Assistant Attorneys General
Counsel for Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
(312) 793-2877

John F. Mortell
Chairman
Frederick L. Corban
Commissioner
G. Richard Klein
Commissioner
David E. Ziegner
Commissioner
Mary Jo Huffman
Commissioner
Indiana Utility Regulatory Commission
Indiana Government Center
302 West Washington Street
Suite #306
Indianapolis, Indiana 46204
(317) 232-2523

DIANE MUNNS
General Counsel
Iowa Utilities Board
Lucas State Office Building
Fifth Floor
Des Moines, Iowa 50319
(515) 281-4189

LORI A. FINK
Acting General Counsel
State of Kansas
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027
(913) 271-3110

AMY E. DOUGHERTY
Counsel for
Kentucky Public Service Commission
730 Schenkel Lane
Post Office Box 615
Frankfort, Kentucky 40602
(502) 564-3940

MICHAEL J. TRAVIESO
Maryland People's Counsel
6 St. Paul Street, Suite 2101
Baltimore, Maryland 21202
(410) 767-8150

FRANK J. KELLY
Attorney General
THOMAS L. CASEY
Solicitor General
DON L. KESKEY
HENRY J. BOYNTON
Assistant Attorneys General
Public Service Division
Attorneys for the State of Michigan
1000 Long Blvd., Suite 11
Lansing, MI 48911
(517) 699-1200

FRANK J. KELLY
Attorney General
THOMAS L. CASEY
Solicitor General
DON L. KESKEY
HENRY J. BOYNTON
Assistant Attorneys General
Public Service Division
Attorneys for the Michigan Public Service Commission
1000 Long Blvd., Suite 11
Lansing, MI 48911
(517) 699-1200

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
Attorney for Minnesota Public Utilities Commission
102 State Capitol
St. Paul, NO 55155
(612) 297-4272

THOMAS R. SCHWARZ, JR.
Senior Counsel
Attorney for the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
(314) 751-5239

MARTHA S. HOGERTY
Public Counsel
Missouri Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102
(314) 751-4857

ROBIN A. MCHUGH
Special Assistant
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601
(406) 444-6376

AMY L. IGNATIUS
General Counsel
The State of New Hampshire Public Utilities Commission
8 Old Suncook Road
Concord, New Hampshire 03301
(603) 271-2431

TOM UDALL
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe. N.M. 87504-1508
(505) 827-6000

HEIDI HEITKAMP
Attorney General
State of North Dakota
WILLIAM W. BINEK
Assistant Attorney General
Attorneys for the Public Service Commission
State Capitol
Bismark, ND 58505
(701) 224-2400

BETTY D. MONTGOMERY
Attorney General of Ohio
DUANE W. LUCKEY
ANN E. HENKENER
Assistant Attorneys General
Office of the Ohio AG
Public Utilities Section
Attorneys for the Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, Ohio 43215
(614) 466-3016

JOAN H. SMITH
Chairman
RON EACHUS
Commissioner
ROGER HAMILTON
Commissioner
Oregon Public Utility Commission
550 Capitol St NE
Salem, Oregon 97310-1380
(503) 376-6611

IRWIN A. POPOWSKY
Consumer Advocate
Commonwealth of Pennsylvania
Office of Consumer Advocate
1425 Strawberry Street
Harrisburg, PA 17120
(717) 783-5048

MAUREEN A. SCOTT
VERONICA A. SMITH
JOHN POVILAITIS
Pennsylvania Public Utility Commission
P.O. Box 3265
G-28 North Office Bldg
Harrisburg, Pennsylvania 17120
(717) 787-4945

JEFFREY B. PINE
Attorney General
State of Rhode Island and Providence Plantations
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

CHRISTINE A. (ADRIANNE) G. SOUTHGATE
General Counsel
Rhode Island Public Utilities Commission
100 Orange Street
Providence, Rhode Island 02903
(401) 277-3500

F. DAVID BUTLER
General Counsel
Public Service Commission of South Carolina
P.O. Drawer 11649
Columbia, South Carolina 29211
(803) 737-5133

ROLAYNE AILTS WIEST
General Counsel
South Dakota Public Service Commission
500 E. Capitol
Pierre, South Dakota 57501
(605) 773-3201

STEPHEN F. MECHAM
Chairman
Utah Public Service Commission
160 East 300 South
Post Office Box 45585
Salt Lake City, Utah 84145
(801) 530-6716

JEFFREY L. AMESTOY
Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

MICHAEL H. DWORKIN
General Counsel
Vermont Public Service Board
City Center Building
89 Main Street
Montpelier, VT 05609-1001
(802) 828-2358

MARCH 13, 1995

ROBERT M. GILLESPIE
Associate General Counsel
Virginia State Corporation Commission
P.O. Box 1197
Richmond, Virginia 23209
(804) 371-9671

RICHARD E. HITT
General Counsel
West Virginia Public Service Commission
201 Brooks Street
P.O. Box 812
Charleston, WV 25323

STEVEN ELLENBECKER,
Chairman
DOUG DOUGHTY
Deputy Chairman
BIL TUCKER
Commissioner
Wyoming Public Service Commission
700 West 21st Street
Cheyenne, Wyoming 82002
(307) 777-7427

APPENDIX A

Rule 33.2, U.S. Supr.Ct. Rule 33.2, 28 U.S.C.A. (1994), allows for additional counsel to be listed on the cover of a brief. As, with over forty parties, Counsel of Record was unable to fit them all on the inside covers of the brief, Counsel contacted Mr. Frank Lorson of the U.S. Supreme Court Clerk's office for advice. He suggested that we list as many as possible on the inside cover of the brief and then reference an appendix for the remainder.

MYRA L. KAREGIANES
General Counsel
JOHN P. KELLIHER
Special Assistant Attorneys General
Counsel for Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
(312) 793-2877

John F. Mortell
Chairman
Frederick L. Corban
Commissioner
G. Richard Klein
Commissioner
David E. Ziegner
Commissioner
Mary Jo Huffman
Commissioner
Indiana Utility Regulatory Commission
Indiana Government Center
302 West Washington Street
Suite #306
Indianapolis, Indiana 46204
(317) 232-2523

DIANE MUNNS
General Counsel
Iowa Utilities Board
Lucas State Office Building
Fifth Floor
Des Moines, Iowa 50319
(515) 281-4189

LORI A. FINK
Acting General Counsel
State of Kansas
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027
(913) 271-3110

AMY E. DOUGHERTY
Counsel for
Kentucky Public Service Commission
730 Schenkel Lane
Post Office Box 615
Frankfort, Kentucky 40602
(502) 564-3940

MICHAEL J. TRAVIESO
Maryland People's Counsel
6 St. Paul Street, Suite 2101
Baltimore, Maryland 21202
(410) 767-8150

FRANK J. KELLY
Attorney General
THOMAS L. CASEY
Solicitor General
DON L. KESKEY
HENRY J. BOYNTON
Assistant Attorneys General
Public Service Division
Attorneys for the State of Michigan
1000 Long Blvd., Suite 11
Lansing, MI 48911
(517) 699-1200

FRANK J. KELLY
Attorney General
THOMAS L. CASEY
Solicitor General
DON L. KESKEY
HENRY J. BOYNTON
Assistant Attorneys General
Public Service Division
Attorneys for the Michigan Public Service Commission
1000 Long Blvd., Suite 11
Lansing, MI 48911
(517) 699-1200

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
Attorney for Minnesota Public Utilities Commission
102 State Capitol
St. Paul, NO 55155
(612) 297-4272

THOMAS R. SCHWARZ, JR.
Senior Counsel
Attorney for the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
(314) 751-5239

MARTHA S. HOGERTY
Public Counsel
Missouri Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102
(314) 751-4857

ROBIN A. MCHUGH
Special Assistant
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601
(406) 444-6376

AMY L. IGNATIUS
General Counsel
The State of New Hampshire Public Utilities Commission
8 Old Suncook Road
Concord, New Hampshire 03301
(603) 271-2431

TOM UDALL
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe. N.M. 87504-1508
(505) 827-6000

HEIDI HEITKAMP
Attorney General
State of North Dakota
WILLIAM W. BINEK
Assistant Attorney General
Attorneys for the Public Service Commission
State Capitol
Bismark, ND 58505
(701) 224-2400

BETTY D. MONTGOMERY
Attorney General of Ohio
DUANE W. LUCKEY
ANN E. HENKENER
Assistant Attorneys General
Office of the Ohio AG
Public Utilities Section
Attorneys for the Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, Ohio 43215
(614) 466-3016

JOAN H. SMITH
Chairman
RON EACHUS
Commissioner
ROGER HAMILTON
Commissioner
Oregon Public Utility Commission
550 Capitol St NE
Salem, Oregon 97310-1380
(503) 376-6611

IRWIN A. POPOWSKY
Consumer Advocate
Commonwealth of Pennsylvania
Office of Consumer Advocate
1425 Strawberry Street
Harrisburg, PA 17120
(717) 783-5048

MAUREEN A. SCOTT
VERONICA A. SMITH
JOHN POVILAITIS
Pennsylvania Public Utility Commission
P.O. Box 3265
G-28 North Office Bldg
Harrisburg, Pennsylvania 17120
(717) 787-4945

JEFFREY B. PINE
Attorney General
State of Rhode Island and Providence Plantations
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

CHRISTINE A. (ADRIANNE) G. SOUTHGATE
General Counsel
Rhode Island Public Utilities Commission
100 Orange Street
Providence, Rhode Island 02903
(401) 277-3500

F. DAVID BUTLER
General Counsel
Public Service Commission of South Carolina
P.O. Drawer 11649
Columbia, South Carolina 29211
(803) 737-5133

ROLAYNE AILTS WIEST
General Counsel
South Dakota Public Service Commission
500 E. Capitol
Pierre, South Dakota 57501
(605) 773-3201

STEPHEN F. MECHAM
Chairman
Utah Public Service Commission
160 East 300 South
Post Office Box 45585
Salt Lake City, Utah 84145
(801) 530-6716

JEFFREY L. AMESTOY
Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

MICHAEL H. DWORKIN
General Counsel
Vermont Public Service Board
City Center Building
89 Main Street
Montpelier, VT 05609-1001
(802) 828-2358

ROBERT M. GILLESPIE
Associate General Counsel
Virginia State Corporation
Commission
P.O. Box 1197
Richmond, Virginia 23209
(804) 371-9671

RICHARD E. HITT
General Counsel
West Virginia Public Service
Commission
201 Brooks Street
P.O. Box 812
Charleston, WV 25323

STEVEN ELLENBECKER,
Chairman
DOUG DOUGHTY
Deputy Chairman
BIL TUCKER
Commissioner
Wyoming Public Service
Commission
700 West 21st Street
Cheyenne, Wyoming 82002
(307) 777-7427

GALE A. NORTON
Attorney General
STEPHEN K. ERKENBRACK
Chief Deputy Attorney General
MERRILL SHIELDS
Deputy Attorney General
RICHARD DJOKIC
First Assistant Attorney General
ANTHONY MARQUEZ
CAROL SMITH RISING
Assistant Attorneys General
Attorneys for Public Utilities Commission of the State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
(303) 866-5395

RICHARD BLUMENTHAL
Attorney General of Connecticut
ROBERT S. GOLDEN, JR.
Assistant Attorney General
Attorneys for State of Connecticut and the Connecticut Department of Public Utility Control
One Central Park Plaza
New Britain, CT 06051
(203) 827-2620

DARYL L. AVERY
General Counsel
JOSEPHINE S. SIMMONS
Staff Counsel
Public Service Commission of the District of Columbia
450 Fifth Street, N.W.
Suite 815
Washington, D.C. 20001
(202) 626-5140

JACK SHREVE
Public Counsel
CHARLES J. BECK
Deputy Public Counsel
Office of Public Counsel
Attorneys for the Citizens of the State of Florida
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399
(904) 488-9330

ROBERT D. VANDIVER
General Counsel
CYNTHIA B. MILLER
Associate General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850
(904) 488-7463

YUKIO NAITO
Chairman
Public Utilities Commission
State of Hawaii
465 South King Street
Kekuanaoa Building, Rm 103
Honolulu, Hawaii 96813
(808) 586-2020

MARSHA H. SMITH
President
DONALD L. HOWELL, III
Deputy Attorney General
Idaho Public Utilities Commission
P.O. Box 83720
Boise, Idaho 83720-0074
(208) 334-0300*

* **As per instructions, the remainder of parties joining in this brief are listed in Appendix A, which begins on page 26.**

BEST AVAILABLE COPY